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14  
15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
16 **FOR THE COUNTY OF SAN DIEGO**

**VIA-FAX**

17  
18 Viejias Band of Kumeyay Indians, a federally  
19 recognized Indian Tribe,

20 Petitioner and Plaintiff,

21 v.

22 PADRE DAM MUNICIPAL WATER  
DISTRICT, a public agency; and DOES 1  
23 through 10, inclusive,

24 Respondents and Defendants,

Case No. 37-2010-00093203-CU-TT-CTO

Complaint Filed: June 1, 2010

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF EX  
PARTE APPLICATION FOR  
TEMPORARY RESTRAINING ORDER**

Date: June 1, 2010

Time: 2:00 p.m.

Dept: 68—Hon. Judith Hayes

**FILED**  
Clerk of the Superior Court  
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By R. PORTILLO, Deputy

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1 Petitioner/Plaintiff VIEJAS BAND OF KUMEYAAAY INDIANS, a federally recognized  
2 Indian Tribe ("Viejas"), respectfully submits the following memorandum of points and authorities  
3 in support of its ex parte application for a temporary restraining order ("TRO") against  
4 Respondent/Defendant PADRE DAM MUNICIPAL WATER DISTRICT ("District").

5  
6 **I. INTRODUCTION**

7 Having suspended construction on an admittedly supplemental reservoir project for over 3  
8 months, the District has suddenly stated last week that it intends to resume construction activities  
9 today, notwithstanding (or, perhaps, because of) an imminent June 17 hearing before the Native  
10 American Heritage Commission ("NAHC") to determine whether that very construction may  
11 cause severe or irreparable damage to a Native American subtitled cemetery or ceremonial site.  
12 The NAHC has warned the District not to commence construction prior to the conclusion of its  
13 hearing process. District has signaled its intent to disregard the NAHC's warning.

14 Viejas seeks this TRO to preserve the status quo to protect the integrity of the Native  
15 American burials, grave goods, ceremonial items and cultural resources present at the site pending  
16 that June 17 NAHC hearing and a hearing before this court on a preliminary injunction. Absent a  
17 TRO, irreparable harm will be suffered by Viejas and the public, and the jurisdiction of the NAHC  
18 will be compromised.

19 **II. FACTUAL SUMMARY**

20 The reservoir project is called the Padre Dam Eastern Service Area Secondary Connection  
21 Project (the "Project"). The District approved a Mitigated Negative Declaration ("MND") under  
22 the California Environmental Quality Act ("CEQA") at the time of Project approval in August  
23 2008. (Initial Study/Mitigated Negative Declaration ("IS/MND"), dated August 2008.) (Exhibit 1,  
24 hereto.) The Project is a "redundant distribution system and storage area" for the Eastern Service  
25 Area. (IS/MND, p. 6.)

26 As early as 2007, the District had knowledge of the presence of cultural artifacts and other  
27 data that showed significant environmental effects on cultural resources. (E.g. Department of  
28 Parks and Recreation, Archaeological Site Record Form, prepared by EDAW, Inc. ("EDAW"),  
October 4, 2007 ("a large amount of potsherds were found, some of which appeared to have been

1 burnt post-production and could possibly include cremation containers"; Exhibit 2, hereto). None  
2 of that information was disclosed to the public in the MND, and no potentially significant  
3 environmental effect was identified in the initial study or MND as to burials or historic resources.  
4 (IS/MND.)

5 After commencing Project construction, a significant amount of bones and grave goods  
6 were discovered. (E.g., ASM Data Recovery Report, Fieldwork Results, August 2009, pp. 31-49;  
7 Exhibit 3, hereto). Although Viejas requested that the District prepare subsequent environmental  
8 documentation (Viejas letter to District, March 10, 2010; Exhibit 4, hereto), none was considered  
9 or adopted by the District.

10 Pursuant to Public Resources Code ("PRC") section 5097.98, Viejas has been designated  
11 as the "Most Likely Descendant" ("MLD") of the Native American burials, grave goods and  
12 ceremonial items discovered within the Project area. (KCRC letter to NAHC, February 8, 2010;  
13 Exhibit 5, hereto.) The District, a public agency, is the owner of the property which is the subject  
14 of this action. (IS/MND.)

15 As MLD, Viejas has repeatedly objected to the lack of avoidance or mitigation of the  
16 impacts on cultural resources and burial sites and made recommendations for Project changes.  
17 (E.g., Viejas letter to District, February 17, 2010; Exhibit 6 hereto.) On February 24, 2010, the  
18 NAHC notified the District to cease construction until completion of the analysis of the impact of  
19 the Project on tribal cultural resources was performed in consultation with Viejas, the MLD.  
20 (NAHC letter to District, February 24, 2010; Exhibit 7, hereto.) On February 25, the District  
21 suspended construction on the project, but subsequently refused to consider Viejas' objections and  
22 recommendation. Instead, the District sought mediation with the NAHC, which Viejas accepted.  
23 (District letter to NAHC, March 12, 2010; Exhibit 8, hereto.)

24 With the initiation of mediation, Viejas and the Sycuan Band of Kumeyaay Indians  
25 ("Sycuan") advised the NAHC that the Project may cause severe or irreparable damage to a Native  
26 American sanctified cemetery or ceremonial site. (Viejas and Sycuan letters to NAHC dated  
27 March 18, 2010, Exhibits 9 and 10, hereto.) The NAHC has commenced a public hearing to  
28 determine whether such damage might occur. The NAHC staff report accepts the tribes'

determination that there is a sanctified cemetery or ceremonial site and that the District is threatening to cause severe and irreparable damage to it. (NAHC Staff Investigation Report, March 29, 2010 ("NAHC Report"); Exhibit 11, hereto.) A hearing to conclude this matter is scheduled for June 17, 2010. NAHC letter to District, May 27, 2010.

Last Friday, the District threatened to commence construction as soon as June 1.<sup>1</sup> (District letter to NAHC, May 27, 2010; Exhibit 12, hereto.) The NAHC has warned the District not to proceed with construction pending the NAHC hearing scheduled for June 17 – sixteen days from today. (NAHC letter to District, May 27, 2010; Exhibit 13, hereto.)

### III. ARGUMENT

#### A. Standards for Issuance of a Temporary Restraining Order

Pursuant to Code of Civil Procedure ("CCP") section 526, an injunction may issue in, inter alia, any of the following situations:

(a) When it appears by the complaint that the plaintiff is entitled to the relief demanded and, the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

(b) When it appears by . . . affidavits that the commission or continuance of some act during the litigation would produce . . . great or irreparable injury;

(c) When it appears, during the litigation, that a party to the action . . . threatens . . . some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual;

(d) When pecuniary compensation would not afford adequate relief.

Here, not one, but all of the foregoing circumstances exist, warranting the issuance of a preliminary injunction against Defendant.

In deciding whether to issue a temporary restraining order, a court must consider the following factors: (1) the likelihood that the moving party will ultimately prevail on the merits;

<sup>1</sup> Following notice by Viejas of its intent to file a petition and complaint and to seek a TRO on June 1, the District has represented that it would not commence construction until a TRO hearing on Wednesday, June 2. (Declaration of Steven P. McDonald, para. 9.)



1 and (2) the relative harm to the parties from the issuance or nonissuance of the injunction.  
2 Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc. (2001) 91 Cal.App.4th 678, 695.)  
3 A mix of potential-merit and interim-harm factors should guide the trial court in its determination.  
4 (Dum v. The State of California, et al. (1992) 4 Cal.4th 668, 678.) "[T]he greater the plaintiff's  
5 showing on one, the less must be shown on the other to support an injunction." (Id.)

6 There are two interrelated factors that courts consider when deciding whether to issue a  
7 preliminary injunction. (El Com. v. County of Imperial (1983) 35 Cal. 3d 63, 69-70.) The first is  
8 whether it is likely that the plaintiff will prevail on the merits at trial. The second is the irreparable  
9 harm the plaintiff is likely to sustain if the injunction is denied compared to the defendant's harm  
10 if the injunction is issued. (Id. at 69-70; CCP § 526(a)(2) ("irreparable harm").) The party  
11 seeking a restraining order bears the burden of proof on these issues. (CCP §§ 526, 527.)

12 **B. Viejas Has Met the Standards for Issuance of a Temporary Restraining Order.**

13 1. **Viejas has Established a Strong Probability of Success on the Merits of Several**  
14 **Causes of Action.**

15 It is reasonably probable that Viejas will prevail on the merits of some or all of the causes  
16 of action pled in the Petition/Complaint. As such, the issuance of a temporary restraining order is  
17 just and appropriate (CCP § 526(a)(1); San Francisco Newspaper Printing Co. v. Sup. Ct. (Miller)  
18 (1985) 170 Cal.App.3d 438, 442). While Viejas should prevail on all of its alleged causes of  
19 action, following are the District's clearest and most egregious violations of law on which Viejas  
20 can show a probability of success on the merits.

21 a) **The District has Failed to Proceed in a Manner Required by PRC Section**  
22 **5097.97 to Allow the NAHC Hearing to Conclude Before Severely and**  
23 **Irreparably Damaging Cultural Resources**

24 PRC Section 5097.97 provides, in relevant part,

25 in the event that any Native American tribe advises the [NAHC] that a proposed  
26 action by a public agency may cause severe or irreparable damage to a Native  
27 American sanctified cemetery, place of worship, religious or ceremonial site, or  
28 sacred shrine located on public property, or may bar appropriate access thereto by  
Native Americans, the [NAHC] shall conduct an investigation as to the effect of the  
proposed action. Where the [NAHC] finds, after a public hearing, that the proposed  
action would result in such damage or interference, the [NAHC] may recommend  
mitigation measures for consideration by the public agency proposing to take such  
action. If the public agency fails to accept the mitigation measures, and if the



1 [NAHC] finds that the proposed action would do severe and irreparable damage to  
2 a Native American sanctified cemetery, place of worship, religious or ceremonial  
3 site, or sacred shrine located on public property, the [NAHC] may ask the Attorney  
4 General to take appropriate legal action pursuant to subdivision (g) of Section  
5 5097.94. (PRC Section 5097.97, underscores added.)

6 Pursuant to this section, on March 18, 2010, Viejas and Sycuan advised the NAHC that the  
7 Project may cause severe or irreparable damage to a Native American sanctified cemetery, place  
8 of worship, religious or ceremonial site, or sacred shrine located on District (public) property.  
9 (Viejas letter to NAHC, March 18, 2010; Exhibit 9, hereto. Letter from Sycuan, March 18, 2010;  
10 Exhibit 10, hereto.)

11 The NAHC staff has conducted an investigation of the Project. NAHC Report. The NAHC  
12 Report found evidence of Native American burials and cultural resources at the Project site, and  
13 accepted the tribal determination that the site is sacred and eligible for the Sacred Land Files  
14 inventory. The NAHC Report concluded that the District is threatening to cause severe and  
15 irreparable damage to a Native American sanctified cemetery. (*Ibid.*)

16 The NAHC took evidence at a public hearing on April 6, 2010, and is currently scheduled  
17 to conclude that hearing on June 17 – about two weeks from now – to determine if the Project  
18 would result in severe and irreparable damage to a Native American sanctified cemetery or  
19 ceremonial site. (NAHC letter to District dated May 27, 2010; Exhibit 13, hereto.) Following that  
20 hearing, the NAHC may recommend mitigation measures for consideration by the District. If the  
21 District fails to accept those mitigation measures, and if the NAHC finds that the proposed action  
22 would do severe and irreparable damage to a Native American sanctified cemetery, place of  
23 worship, religious or ceremonial site, or sacred shrine located on District property, the NAHC may  
24 ask the Attorney General to take appropriate legal action pursuant to subdivision (g) of PRC  
25 section 5097.94.

26 The same day that the NAHC notified the District of the June 17 hearing, the District  
27 announced that it would ignore the NAHC hearing process and proceed on June 1 with  
28 construction as originally designed and approved. (District letter to Viejas, May 28, 2010;  
Exhibit 17, hereto.)

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1 The District has a clear and present duty to respect the jurisdiction and proceedings of the  
2 NAHC under PRC section 5097.97 not to proceed unilaterally with construction prior to  
3 conclusion of the pending NAHC hearing and receipt of any NAHC mitigation recommendations.  
4 District has clearly and unequivocally violated that duty by proposing to initiate the very actions  
5 that the NAHC hearing was designed to investigate and, as needed, stop.

6 By reason of the foregoing, Viejas has shown a probability of success on the merits of its  
7 Sixth Cause of Action.

8 b) The District Failed to Follow CEQA for Project Approval.

9 As early as 2007, the District had evidence that the Project would have a potentially  
10 significant environmental effect on cultural resources. (Department of Parks and Recreation,  
11 Archaeological Site Record Form, prepared by ASM October 4, 2007; Exhibit 2, hereto; Native  
12 American Monitor Lucas letter to ASM, dated September 22, 2007 (Project site "holds a great deal  
13 of pre-history information . . . [and] should be avoided"); Exhibit 15, hereto; Native American  
14 Monitor Linton Letter to District, dated September 23, 2007 ("Potential for human remains is high  
15 . . . We would like for this site to be considered significant and avoided."); Exhibit 16, hereto;  
16 ASM Data Recovery Report, p. 18, (large quantities of burned pottery and rich midden soils  
17 indicated the site deposit had a "high potential for containing human remains."; Exhibit 3, hereto).  
18 Alternatives that could have avoided nearly 60% of the archaeological area were considered by the  
19 District and rejected without being the subject of CEQA review. (Black & Veatch Report dated  
20 January 28, 2008; Exhibit 17, hereto.)

21 The likely presence of Native American human remains on a proposed project site is a  
22 potentially significant environmental effect under CEQA. (See, CEQA Guidelines 15064.5(b) and  
23 (c) ("Determining the Significance of Impacts to Archaeological and Historical Resources").) The  
24 existence of a potentially significant environmental effect triggers a requirement under CEQA to  
25 perform an Environmental Impact Report ("EIR") or to incorporate mitigation measures into the  
26 project so that it is no longer "fairly arguable" that a potentially significant environment effect  
27 exists.

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1 Notwithstanding all of the evidence above, the MND failed to disclose any of that evidence  
2 and indicated "no significant effect" for effects on human remains and historic resources.  
3 (IS/MND). The District knew, but did not disclose to the tribes or the public, that there was  
4 evidence of the likely presence of Native American human remains, grave goods and ceremonial  
5 items on the proposed Project site.

6 The District proceeded in a manner contrary to law by not disclosing this information to  
7 the public or the tribes, by failing to prepare an EIR and to consider project alternatives and to  
8 adopt feasible mitigation measures to avoid or lessen the potentially significant impact on cultural  
9 resources and by proceeding to adopt an MND that knowingly failed to identify any potentially  
10 significant environmental effects.

11 The District prejudicially abused its discretion and acted not in accordance with CEQA  
12 when it knowingly suppressed information that showed actual or potentially significant  
13 environmental effects and proceeded to adopt an MND without revealing those effects in its MND  
14 or to culturally-affiliated tribes or the public and without studying and adopting feasible mitigation  
15 measures to avoid or reduce those effects.

16 By reason of the foregoing, Viejas has shown a probability of success on the merits of its  
17 First Cause of Action.

18 c) Having found new evidence, the District Failed to Prepare Supplemental  
19 Environmental Documents under CEQA

20 Whether or not the District proceeded in accordance with CEQA in the adoption of the  
21 MND (which it did not), subsequent to Project approval the District discovered significant new  
22 information of substantial importance: the existence of a tribal burial ground, grave goods (ASM  
23 Data Recovery Report, Fieldwork Results, August 2009, pp. 31-49) and ceremonial items (id. at  
24 p. 73) ("unparalleled density at nearly all other sites in the San Diego region."). The District then  
25 repatriated the ceramic part of the collection "because KCRC members consider it a burial  
26 ground." (District letter to KCRC, October 27, 2009, Exhibit 18, hereto.) The density of  
27 ceremonial items at this site has been interpreted by Native American Monitor Lucas as indicating

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1 a sacred area where the pottery "more than likely held human remains." (Submission by Native  
2 American Monitor Lucas to NAIIC, dated March 21, 2010; Exhibit 19, hereto.)

3 The Data Recovery Report stated that 14 bone fragments were positively identified by the  
4 Coroner as human. Another 204 pieces of calcined bone apparently were not provided to the  
5 Coroner for positive identification but were simply set aside for repatriation. Among other things,  
6 the report states that: 1) it is possible that fragmented human remains are scattered throughout the  
7 site deposit, both within and outside the core site area; 2) fifty percent of the human remains  
8 discovered at the site during data recovery were found outside the core area in the two test units  
9 done to see if human remains may be outside the core area; 3) that the ceramic sherd density is one  
10 of the highest of any site in San Diego County; and 4) an age range of A.D. 780 and 1910. Other  
11 items found included beads, pipe fragments, arrowtips and quartz items indicating burial and  
12 ceremonial items. (ASM Data Recovery Report, Fieldwork Results, August 2009, pp. 1, 31-49,  
13 73).

14 PRC Section 5097.98(d)(1) provides that

15 (1) [h]uman remains of a Native American may be an inhumation or cremation, and  
16 in any state of decomposition or skeletal completeness", and that (2) "[a]ny items  
17 associated with the human remains that are placed or buried with the Native  
18 American human remains are to be treated in the same manner as the remains, but  
19 do not by themselves constitute human remains.

20 Despite having knowledge of this new information, the District failed to consider this  
21 information and the changed circumstances or to consider preparation of subsequent  
22 environmental documents that could have assessed whether additional measures or actions by the  
23 District were required to avoid the increased environmental harms caused by the Project.

24 If project circumstances change or new information is discovered after the adoption of a  
25 mitigated negative declaration, further environmental review is governed by PRC § 21166,  
26 (Benton v. Board of Supervisors (1991) 226 Cal.App.3d 1467.) The agency must determine  
27 whether a subsequent EIR, negative declaration, an addendum, or no further documentation is  
28 required to be prepared. 14 C.C.R. § 15162(b).

If the agency concludes that an EIR is not required (i.e., there are no significant effects and  
an alternatives analysis is not required), then a subsequent MND may need to be prepared if it is

1 necessary to adopt new measures to mitigate new potentially significant impacts (i.e., to a  
2 previously unstudied Native American burial ground or ceremonial place) to a less than significant  
3 level. If the agency makes minor technical changes or additions to the prior MND, or concludes  
4 that none of the conditions requiring a subsequent MND have occurred, it may prepare an  
5 addendum to the MND. If there is no need to make changes or additions to the prior MND, the  
6 agency need not prepare any further environmental documentation. To Viejas' knowledge, no  
7 subsequent EIRs, subsequent MNDs, addendums to the MND or agency findings of no need to  
8 prepare subsequent environmental documentation were prepared and considered by the District.

9 By reason of the foregoing, Viejas has shown a probability of success on the merits of its  
10 Second Cause of Action that District prejudicially abused its discretion and acted not in  
11 accordance with Section 21166, among others, of CEQA.

12 d) The District Has Failed to Proceed in a Manner Required by Law in  
13 Consulting with the Most Likely Descendant.

14 Pursuant to PRC Section 5097.98,

15 upon the discovery of Native American remains, the landowner shall ensure that  
16 the immediate vicinity, according to generally accepted cultural or archaeological  
17 standards or practices, where the Native American human remains are located, is  
18 not damaged or disturbed by further development activity until the landowner has  
19 discussed and conferred, as prescribed in this section, with the most likely  
20 descendants (MLD) regarding their recommendations, if applicable, taking into  
21 account the possibility of multiple human remains. The landowner shall discuss and  
22 confer with the descendants all reasonable options regarding the descendants'  
23 preferences for treatment. For the purposes of this section, "conferral" or "discuss  
24 and confer" means the meaningful and timely discussion and careful consideration  
25 of the views of each party, in a manner that is cognizant of all parties' cultural  
26 values, and where feasible, seeking agreement. Each party shall recognize the  
27 other's needs and concerns for confidentiality of information provided to the other.  
28 [Underscore added.]

PRC Section 5097.99 provides, in relevant part,

(a) No person shall obtain or possess any Native American artifacts or human  
remains which are taken from a Native American grave or cairn on or after January  
1, 1984, except as otherwise provided by law or in accordance with an agreement  
reached pursuant to subdivision (l) of Section 5097.94 [through the NAHC] or  
pursuant to Section 5097.98 [through the MLD].

Based upon these PRC sections, the District has a clear and present duty under California  
law, including but not limited to PRC 5097.98, to negotiate in good faith with the MLD (Viejas)

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1 as to mitigation measures and recommendations following the discovery of human remains and  
2 grave goods.

3 District has committed a prejudicial abuse of discretion and not acted in accordance with  
4 the law by failing 1) to engage in and complete good faith negotiations with the MLD, 2) to  
5 continue to suspend construction until it has negotiated in good faith with the MLD so that  
6 damage to cultural resources can be avoided, minimized or mitigated to the extent feasible, and  
7 3) to follow the recommendations of the MLD including to conduct an adequate tribal cultural  
8 resources evaluation to determine the extent of cultural resources, including human remains and  
9 items associated with human remains, so that appropriate mitigation measures may be determined.  
10 (District letter to Viejas, May 28, 2010 (Stating that the District will follow HCRC's  
11 recommendations, not those of Viejas); Exhibit 17, hereto).

12 By reason of the foregoing, Viejas has shown a probability of success on the merits of its  
13 Fourth Cause of Action.

14 e) The District Has Failed to Proceed in a Manner Required by Law in  
15 Mediating with the Most Likely Defendant (PRC Section 5097.98(e)).

16 PRC Section 5097.97(k) provides that the NAHC has the power

17 To mediate, upon application of either of the parties, disputes arising between  
18 landowners and [the MLD] relating to the treatment and disposition of Native  
19 American human burials, skeletal remains, and items associated with Native  
20 American burials. The agreements shall provide protection to Native American  
21 human burials and skeletal remains from vandalism and inadvertent destruction and  
22 provide for sensitive treatment and disposition of Native American burials, skeletal  
23 remains, and associated grave goods consistent with the planned use of, or the  
24 approved project on, the land.

25 Following the failure to come to an agreement with Viejas (the MLD), the District initiated  
26 mediation with the NAHC pursuant to PRC Section 5097.97(k). (District letter to NAHC,  
27 March 12, 2010; Exhibit 8, hereto.) The District has failed to mediate in good faith. Rather,  
28 notwithstanding the invocation of the NAHC's mediation jurisdiction, the District has attempted to  
unilaterally and arbitrarily and capriciously declare an impasse in 1) the negotiation of the dispute  
between itself and Viejas, and 2) tried to avoid the jurisdiction of the NAHC to mediate the  
dispute by unilaterally announcing how it intends to proceed at the site, i.e., bulldoze the soil

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1 containing cultural resources and human remains to a corner of the site. (District letter to NAHC,  
2 May 21, 2010; Exhibit 20, hereto.)

3 PRC Section 5097.98(e) provides, in relevant part,

4 whenever . . . the landowner or his or her authorized representative rejects the  
5 recommendation of the [MLD] and the mediation provided for in subdivision (k) of  
6 Section 5097.94, if invoked, fails to provide measures acceptable to the landowner,  
7 the landowner or his or her authorized representative shall reinter the human  
8 remains and items associated with Native American human remains with  
9 appropriate dignity on the property in a location not subject to further and future  
10 subsurface disturbance.

11 The Legislature set a condition precedent in Section 5097.98 to unilateral action by the  
12 District: The District must reject the recommendations from the NAHC mediation. But the  
13 District has not engaged in that mediation, nor has it received recommendations yet from the  
14 NAHC. (NAHC letter to District May 27, 2010 (mediation not completed); Exhibit 13, hereto.)  
15 Thus, the District is not proceeding according to law by going forward to bulldoze the human  
16 remains on the site without even receiving recommendations from the NAHC. (PRC Section  
17 5097.98(e)).

18 The District has a clear and present duty under PRC section 5097.98(e) and 5097.94(k) to  
19 respect the jurisdiction and proceedings of the NAHC and not to proceed unilaterally with  
20 construction prior to conclusion of mediation by NAHC and receipt of any recommendations for  
21 mitigation from the NAHC.

22 By reason of the foregoing, Viejas has shown a probability of success on the merits of its  
23 Fifth Cause of Action.

24 **2. The Legal Remedy for Viejas is Inadequate.**

25 Pecuniary compensation would not afford adequate relief to Viejas, because the movement  
26 or loss of a burial of one of the Viejas' ancestors cannot be valued in terms of money. The  
27 movement or loss of burials and associated grave goods is an affront to the religious and cultural  
28 beliefs of Viejas and would cause irreparable harm to Viejas. Further, movement or destruction of  
29 the burials in violation of the California Health and Safety Code 7050.5 may result in potential  
30 risk to human health and safety.

31 Viejas has established that pecuniary relief is not appropriate in this case.



1           3.     Viejas will Suffer Irreparable Harm.

2           As set forth above, Native American burials, grave goods and ceremonial items have been  
3 discovered within the Project area, and additional Native American burials, grave goods and  
4 ceremonial items are immediately threatened with insensitive and culturally inappropriate  
5 movement and/or destruction at the hands of the District. (District letter to Viejas dated May 28,  
6 2010 (proceeding with original plan with no avoidance or mitigation); Exhibit 14, hereto.)

7           To date, according to the District's own documentation, the human remains of between  
8 three and eight individual Native American people have been positively identified (from the 14  
9 bone fragments positively identified by the Coroner) and removed from the site; another 204  
10 fragments of suspected human remains have been removed from the site and repatriated to KCRC  
11 (the prior MLD). We do not know, however, how many potential individuals those hundreds of  
12 fragments represent as they were not examined by the Coroner. (Data Recovery Report, *supra*, pp.  
13 48-49).

14           According to the District's own cultural resource reports (prepared after the MND was  
15 approved), 1) fragmented human remains could occur throughout the site deposit, within and  
16 outside the core area (*Id.* at pp. viii and 89), 2) fifty percent of the identified human remains came  
17 from the test units outside of the so-called "core area" (*Id.* at pp. 35), and 3) the ceramic sherd  
18 density of one the highest of any recorded site in San Diego County. (*Id.* at pp. 1, 73 and 81).  
19 Also, Viejas has reason to believe that human remains and grave goods and other cultural items  
20 may have been spread across the property during construction activities. Additional pending site  
21 preparation work may also include additional removal of the extensive milling (rock) features at  
22 the site. (See Site Plan attached to Native American Monitor Lucas letter, September 22, 2007;  
23 Exhibit 15, hereto.)

24           The Project's physical impacts to the site have inflicted pain, distress and spiritual  
25 violation upon culturally affiliated people. (See, Viejas letter to NAHC, April 1, 2010, p. 7; Frank  
26 Brown declaration, April 1, 2010 ("when you find a site like that, especially when there are human  
27 remains, you need to leave it alone.") Exhibit 21, hereto.) The damage is irreparable, because of  
28 the manner in which the human remains have been separated from their resting place and from

1 their associated grave goods, mixed in the soil and impacted by construction machinery, and are  
2 such that there is no way they can be reunited in the manner they were interred. The tribal bands  
3 were given no ceremony from the Creator to cure such desecration and can only ask for  
4 forgiveness from the Old Ones. (*Ibid.*)

5 Viejas has established that it will suffer imminent irreparable harm if the Native American  
6 burials, grave goods and ceremonial items are moved or destroyed. Such action will preclude  
7 adjudication of Viejas' causes of action set forth in the Petition/Complaint. The unique nature and  
8 cultural importance of, and responsibility for, maintaining the integrity of the final resting place of  
9 the Viejas people's ancestors is incapable of being replaced should the threatened harm occur.

10 **4. Balancing of Equities.**

11 The Court must exercise its discretion in favor of the party most likely to be injured. If  
12 denial of an injunction would result in great harm to the petitioner/plaintiff and the  
13 respondents/defendant would suffer little harm if it were granted, then it is an abuse of discretion to  
14 fail to grant the preliminary injunction or temporary restraining order, in this case. (*Robbins v.*  
15 *Sup. Ct. (County of Sacramento)* (1985) 38 Cal.3d 199).

16 In the present case, both Viejas and the public interest would suffer great irreparable harm  
17 if the temporary restraining order is not granted, as the burial of an ancestor is unique and  
18 irreplaceable and is protected from disturbance under CEQA (e.g., the requirement to adopt  
19 feasible mitigation measures) and the Public Resources Code (e.g., protection of sacred sites).

20 The NAHC itself has requested several times that the District continue to suspend  
21 construction. (NAHC letters to District dated February 24 and May 27, 2010; Exhibits 7 and 13,  
22 hereto.)

23 The District has admitted in its own documentation (including the MND) that the Project is  
24 not urgent: It is for a redundant water delivery system, and the current system is fully adequate to  
25 meet current needs. On the other hand, District may suffer only monetary losses, although it is not  
26 conclusive that such losses will, in fact, be suffered.

27 Importantly, when considering the equities, the Court must recognize that the current  
28 situation is one of the District's own making. Respondent: 1) suppressed relevant information that

1 it was legally required to disclose; 2) failed to assess subsequent new information and determine  
2 whether a supplemental EIR should be prepared; 3) threatened to resume Project-related  
3 construction prior to commencement of the District-requested NAHC mediation; 4) threatened to  
4 resume of Project-related construction prior to the continued NAHC public hearing pending only  
5 16 calendar days from today; 5) failed to provide information to, and negotiate in good faith with  
6 Viejas ; and 6) is attempting to obstruct and potentially moot the NAHC's performance of its  
7 duties both as to mediation and in making a determination that the land on which the Project is  
8 being constructed constitutes a "sanctified cemetery" and/or "ceremonial site".

9 **5. Preservation of Status Quo.**

10 Site preparation work has already been suspended by the District since February 25, 2010,  
11 (more than three months), and only now, as a hearing approaches before the NAHC and the  
12 release of the NAHC report with proposed findings of sanctified cemetery is pending, has the  
13 District suddenly threatened to immediately resume construction. This temporary restraining  
14 order will preserve the status quo of leaving the Native American burials, grave goods and  
15 ceremonial items undisturbed pending: 1) continued conferral between the District and Viejas; 2)  
16 mediation between the District and Viejas before the NAHC; 3) conclusion of the NAHC hearing  
17 to determine if the site is a "sanctified cemetery" or "ceremonial place;" and 4) a full briefing and  
18 hearing before this court on a preliminary injunction.

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IV. CONCLUSION

Based on the foregoing, Viejas respectfully requests that the Court grant its application for a temporary restraining order against the District until a scheduled hearing for a preliminary injunction.

Respectfully submitted,

DATED: June 1, 2010

THE McDONALD LAW FIRM, LC

By: 

Steven P. McDonald  
Attorneys for Viejas Band of Kumeyaay Indians

**EXHIBIT HH**

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2 Christopher J. Martin, State Bar No. 249129  
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4 7855 Fay Avenue, Suite 250  
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18 Alpine, CA 91901  
19 Telephone No.: 619.659.1710  
20 Fax No.: 619.659.1970

21 Attorneys for Petitioner and Plaintiff Viejas Band of Kumeyaay Indians

22  
23  
24 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
25 **FOR THE COUNTY OF SAN DIEGO**  
26

27 Viejas Band of Kumeyaay Indians, a federally  
28 recognized Indian Tribe,

Petitioner and Plaintiff,

v.

PADRE DAM MUNICIPAL WATER  
DISTRICT, a public agency; and DOES 1  
through 10, inclusive,

Respondents and Defendants,

Case No. 37-2010-00093203

Complaint Filed: June 1, 2010

**PETITIONER'S OBJECTIONS TO  
EVIDENCE FILED BY RESPONDENT IN  
OPPOSITION TO EX PARTE MOTION  
FOR TEMPORARY RESTRAINING  
ORDER**

Date : June 7, 2010

Time: 8:45am

Dept: 68

29 Pursuant to California /rules of Court, Rule 3.1354, Petitioner Viejas Band of Kumeyaay  
30 Indians ("Petitioner") hereby makes the following objections to the evidence submitted by  
31 Respondent Padre Dam Municipal Water District ("Respondent") in opposition to Petitioner's Ex  
32 Parte Application for Temporary Restraining Order and Order to Show Cause:  
33

1 **Objection Number 1**

- 2
- 3 (1) The specific material to which an objection is made is located in the document titled:
- 4 "Affidavit of Howard Cuero", Exhibit N in Respondent's Supplemental Notice of
- 5 Lodgment in Support of Opposition to Ex Parte Application for Temporary Restraining
- 6 Order.
- 7
- 8 (2) Petitioner objects to the Affidavit of Howard Cuero in its entirety and to paragraphs 1, 6, 9,
- 9 and 10.
- 10
- 11 (3) The specific objectionable statements are as follows:
- 12
- 13 a. Paragraph 1: "I am qualified and have experience as a Native American Monitor."
- 14
- 15 b. Paragraph 6: "Approximately three bone fragments were uncovered, but based on
- 16 the size of the bones and the lack of charring, I believe the bones recovered were
- 17 animal, probably cow, as opposed to human remains."
- 18
- 19 c. Paragraph 9: "Based upon my observations of the quantify [sic: quantity] and type
- 20 of items recovered at the Project site, I do not believe the site is a sanctified burial
- 21 ground, cemetery or ceremonial place. I further do not believe that there is any
- 22 evidence to support the site being determined to be [sic: a] graveyard or burial
- 23 ground. Given the low concentration of human remains recovered on the site, none
- 24 of which were recovered during my period on site, I am of the opinion the site is a
- 25 watering hole where earl Native American people stopped to eat and rest during
- 26 their journey. I believe any human bones found at the site were only there
- 27 incidentally, in that some Native American happened to die while at the rest area,
- 28 as opposed to the site being a dedicated burial area."

///



1 d. Paragraph 10: "I do not believe that avoidance is appropriate or necessary to  
2 mitigate the impact of the project on any Native American cultural resources which  
3 may be uncovered as a result of future construction on the site."

4 e. Entire "affidavit."  
5

6 **(4) Grounds for Objection 1: Improper form of affidavit, lack of foundation and**  
7 **speculation.**

8 **Improper form of affidavit.** The Affidavit of Howard Cuero is purportedly signed but  
9 not dated. CCP section 2015.5 requires that an affidavit or declaration "if executed within  
10 this state, states the date and place of execution." This "affidavit" is undated – only a  
11 month and year are typed, no date is entered.  
12

13 **Lack of foundation objection.** As to paragraph 1, Mr. Cuero states only a conclusion that  
14 he is "qualified and has experience as a Native American Monitor." Nowhere does Mr.  
15 Cuero provide any information as to his special knowledge, skill, experience, training, or  
16 education to be a Native American Monitor. Indeed, the Affidavit even fails to provide a  
17 foundation that he is Native American. California Evidence Code 720(a) provides: "A  
18 person is qualified to testify as an expert if he has special knowledge, skill, experience,  
19 training, or education sufficient to qualify him as an expert on the subject to which his  
20 testimony relates. Against the objection of a party, such special knowledge, skill,  
21 experience, training, or education must be shown before the witness may testify as an  
22 expert." Indeed, the "affidavit" fails to identify the basis on which he claims to be Native  
23 American.

24 As to paragraph 6, Mr. Cuero expresses his belief that "the bones recovered were  
25 animal, probably cow, as opposed to human remains." Nowhere does Mr. Cuero provide  
26 any information as to his special knowledge, skill, experience, training, or education to  
27 identify bones or human remains. (Evid. Code §720(a))  
28

1 As to paragraph 9, Mr. Cuero again fails to provide any information as to his  
2 special knowledge, skill, experience, training, or education to opine on whether a site is a  
3 sanctified burial ground, cemetery, ceremonial place, or only a watering hole. (Evid. Code  
4 §720(a))

5 In addition to failing to provide any information as to his special knowledge, skill,  
6 experience, training, or education to render such an opinion, Mr. Cuero fails to provide any  
7 foundation that he is qualified to render an opinion specifically as to burial grounds,  
8 cemeteries or ceremonial places that might be sanctified within the Viejas Band's territory.  
9 (Evid. Code §§ 403, 405 and 702.) Further, Mr. Cuero does not cite or reference, nor says  
10 that he has reviewed, any of the project reports (e.g., ASM Data Recovery Report,  
11 Petitioner's Exhibit 3), talked to any of the Native Americans who previously observed the  
12 site (e.g., Carmen Lucas, Clint Litton, or Frank Brown) or is qualified to render opinions  
13 on bone identification. Finally, Mr. Cuero does not say how he determined that  
14 fragmented human remains from cremation were not at this particular site, absent testing  
15 with the water screening protocol used in ASM Data Recovery Report, Petitioner's Exhibit  
16 3.

17 As to paragraph 10, Mr. Cuero state that he does not believe "avoidance is  
18 appropriate or necessary to mitigate the impact of the project on any Native American  
19 cultural resources which may be uncovered as a result of future construction on the site."  
20 Again, Mr. Cuero fails to provide 1) any information as to his as to his special knowledge,  
21 skill, experience, training, or education (Evidence Code Section 720(a)) or 2) any  
22 evidentiary foundation to render an opinion on what Native American cultural resources  
23 may be uncovered as the result of future construction or whether avoidance might be  
24 necessary or appropriate. (Evid. Code §§ 403, 405 and 702.) Further, he fails to identify  
25 the legal or other standards that he has used to express his opinion regarding the  
26 appropriateness or necessity of avoidance. (Id.)  
27  
28

1 **Objection Number 2**

- 2
- 3 (1) The specific material to which objections are made is located in the document titled:
- 4 "Declaration of Neal D. Brown."
- 5 (2) Petitioner objects to the Affidavit of Howard Cuero in its entirety and to paragraphs 1, 6, 9,
- 6 and 10.
- 7
- 8 (3) The specific objectionable statements are as follows:
- 9 a. Paragraph 2: "The Project is urgently needed to provide water delivery reliability
- 10 to the communities in East County that are at high risk for water shortages and
- 11 wildfires."
- 12 b. Paragraph 4: "KCRC blessed both the Project and the District."
- 13
- 14 c. Paragraph 6: "Despite the abnormality of the re-designation [of MLD from KCRC
- 15 to Viejas]."
- 16 d. Paragraph 8: "The delay on the project is exposing the District to damages of up to
- 17 \$150,000 a month."
- 18
- 19 e. Paragraph 10: "If the District were forced to abandon the current site, the District
- 20 would lose between \$10 and \$20 million. The cost to relocate the Project to
- 21 another site, if another site were even available, would be an additional \$1 to \$2
- 22 million."

23 **(4) Grounds for Objection 2: Lack of foundation and hearsay**

24

25 **Lack of foundation objection.** As to statement in paragraphs 2, 6, 8 and 10, Mr. Neal

26 provides no foundation for his opinions or for the estimates of costs. (Evidence Code

27 Sections 403, 405 and 702.) In paragraph 2, he states that the Project is "urgently needed."

28

1 The Mitigated Negative Declaration ("MND") states that the District would be able to  
2 meet districtwide demands without the Project. Petitioner's Exhibit 1 at p. 6. Nowhere  
3 does the MND state that the Project is "urgently needed." Mr. Neal provides no factual  
4 information to support his opinion that the Project is "urgently needed." (Evid. Code §§  
5 403, 405 and 702.)

6 As paragraph 6, Mr. Neal provides no factual information or foundation to support  
7 his opinion that the transfer of "most likely descendant" ("MLD") designation from KCRC  
8 to Viejas, one of the member tribes of KCRC, is abnormal. (Evid. Code §§ 403, 405 and  
9 702.)

10 As to paragraph 8, Mr. Neal opines as to the "exposure" of the District to damages  
11 for delay. Mr. Neal provides no factual information, e.g., references to contracts, claims or  
12 to whom the District might be "exposed," to provide a foundation for opining about the  
13 extent of potential delay damages to the District. (Evid. Code §§ 403, 405 and 702.)

14 Similarly, as to paragraph 10, Mr. Neal provides various estimates of costs that  
15 might be incurred should the project be abandoned or relocated. However, Mr. Neal fails  
16 to provide any evidentiary foundation for any of these estimates, including what these  
17 estimates include, to whom the costs would be paid, appraisals of alternative locations or  
18 any other information. (Evid. Code §§ 403, 405 and 702.)

19 As to paragraph 4, Mr. Neal provides no foundation as to how he has personal  
20 knowledge of the customs and rituals of the Tribal Bands comprising the KCRC who  
21 conducted a ceremony at the site and knows that they "blessed" the Project or the District.

22  
23 DATED: June 7, 2010

Respectfully submitted,  
THE McDONALD LAW FIRM, LC

24  
25 By:



26 Steven P. McDonald  
27 Attorneys for Viejas Band of Kumeyaay Indians  
28

1 **COURT'S RULINGS AND ORDER RE PETITIONER'S OBJECTIONS TO EVIDENCE**  
2 **FILED BY RESPONDENT IN OPPOSITION TO EX PARTE MOTION FOR**  
3 **TEMPORARY RESTRAINING ORDER**

4 Objections to Howard Cuero Declaration  
5 Objection Number 1

- 6 a. Paragraph 1: "I am qualified and have experience as a Native American Monitor."

7 Grounds for objection: Expert Opinion (Evid. Code §720(a))

8 Court's Ruling on Objection: Sustained: \_\_\_\_\_

9 Overruled: \_\_\_\_\_

- 10 b. Paragraph 6: "Approximately three bone fragments were uncovered, but based on  
11 the size of the bones and the lack of charring, I believe the ones recovered were  
12 animal, probably cow, as opposed to human remains."

13 Grounds for objection: Expert Opinion (Evid. Code §720(a))

14 Court's Ruling on Objection: Sustained: \_\_\_\_\_

15 Overruled: \_\_\_\_\_

- 16 c. Paragraph 9: "Based upon my observations of the quantify [sic: quantity] and type  
17 of items recovered at the Project site, I do not believe the site is a sanctified burial  
18 ground, cemetery or ceremonial place. I further do not believe that there is any  
19 evidence to support the site being determined to be [sic: a] graveyard or burial  
20 ground. Given the low concentration of human remains recovered on the site, none  
21 of which were recovered during my period on site, I am of the opinion the site is a  
22 watering hole where earl Native American people stopped to eat and rest during  
23 their journey. I believe any human bones found at the site were only there  
24 incidentally, in that some Native American happened to die while at the rest area,  
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1 as opposed to the site being a dedicated burial area."

2  
3 Grounds for objection: (Evid. Code §720(a); Foundation (Cal. Evidence Code §§  
4 403, 405 and 702.))

5 Court's Ruling on Objection: Sustained: \_\_\_\_\_

6 Overruled: \_\_\_\_\_

- 7  
8 d. Paragraph 10: "I do not believe that avoidance is appropriate or necessary to  
9 mitigate the impact of the project on any Native American cultural resources which  
10 may be uncovered as a result of future construction on the site."

11 Grounds for objection: Expert Opinion (Evid. Code §720(a); Foundation (Cal.  
12 Evidence Code §§ 403, 405 and 702.))

13  
14 Court's Ruling on Objection: Sustained: \_\_\_\_\_

15 Overruled: \_\_\_\_\_

- 16  
17 e. Entire "affidavit."

18 Grounds for objection: Lack of date (CCP § 2015.5)

19  
20 Court's Ruling on Objection: Sustained: \_\_\_\_\_

21 Overruled: \_\_\_\_\_

22  
23 / / /

24 / / /

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Objections to Neal D. Brown Declaration

Objection Number 2

- a. Paragraph 2: "The Project is urgently needed to provide water delivery reliability to the communities in East County that are at high risk for water shortages and wildfires."

Grounds for objection: Lack of foundation (Evid. Code §§ 403, 405 and 702.)

Court's Ruling on Objection: Sustained: \_\_\_\_\_

Overruled: \_\_\_\_\_

- b. Paragraph 4: "KCRC blessed both the Project and the District."

Grounds for objection: Lack of foundation (Evid. Code §§ 403, 405 and 702.)

Court's Ruling on Objection: Sustained: \_\_\_\_\_

Overruled: \_\_\_\_\_

- c. Paragraph 6: "Despite the abnormality of the re-designation [of MLD from KCRC to Viejas]."

Grounds for objection: Lack of foundation (Evid. Code §§ 403, 405 and 702.)

Court's Ruling on Objection: Sustained: \_\_\_\_\_

Overruled: \_\_\_\_\_

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- 1 d. Paragraph 8: "The delay on the project is exposing the District to damages of up to  
2 \$150,000 a month."

3 Grounds for objection: Lack of foundation (Evid. Code §§ 403, 405 and 702.)

4 Court's Ruling on Objection: Sustained: \_\_\_\_\_

5 Overruled: \_\_\_\_\_

- 6  
7 e. Paragraph 10: "If the District were forced to abandon the current site, the District  
8 would lose between \$10 and \$20 million. The cost to relocate the Project to  
9 another site, if another site were even available, would be an additional \$1 to \$2  
10 million."

11 Grounds for objection: Lack of foundation (Evid. Code §§ 403, 405 and 702.)

12 Court's Ruling on Objection: Sustained: \_\_\_\_\_

13 Overruled: \_\_\_\_\_

14 IT IS SO ORDERED:

15 Date: \_\_\_\_\_

16 Judge \_\_\_\_\_

## EXHIBIT II







02/24/2010 10:05



02/24/2018 10:00

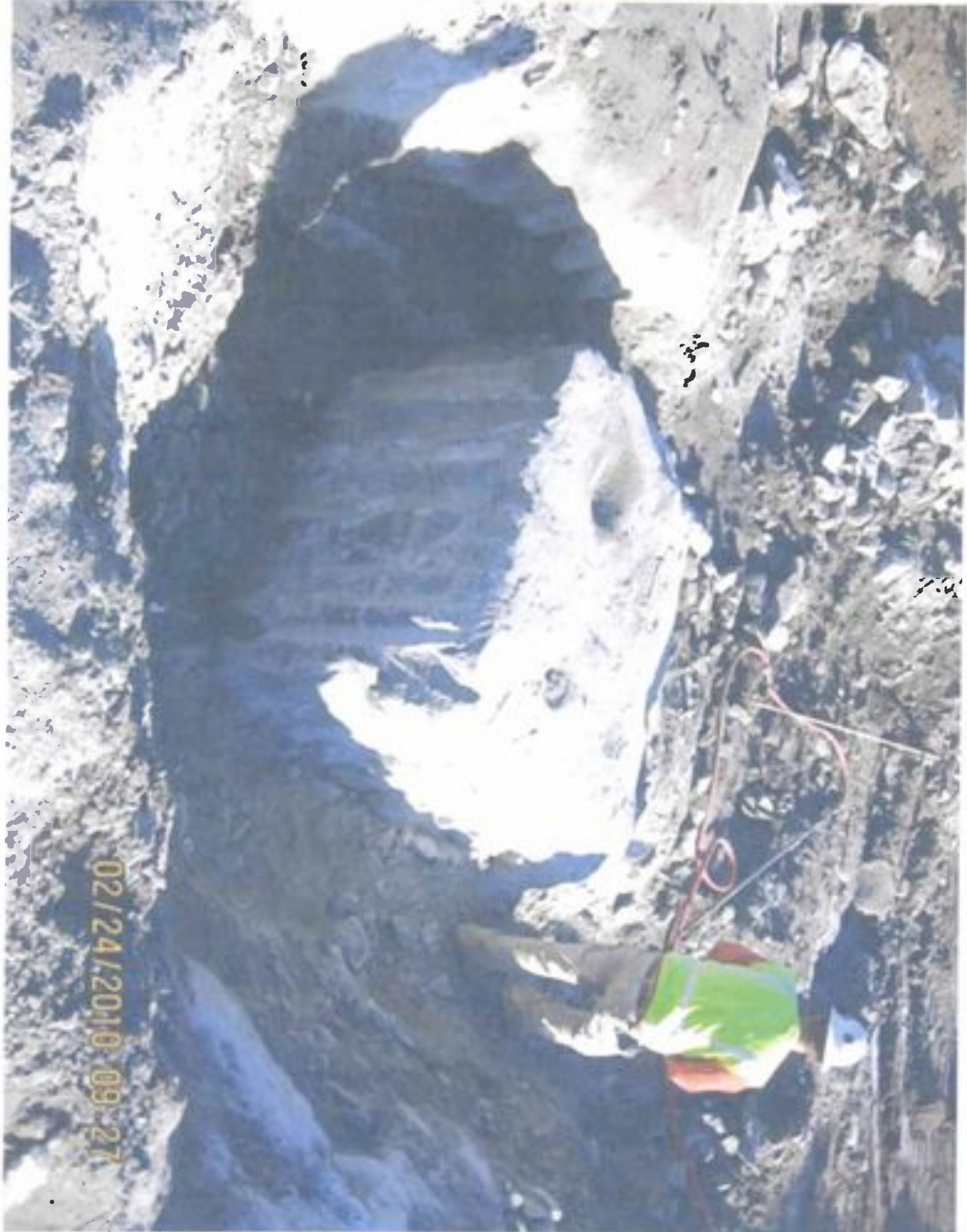




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**EXHIBIT JJ**

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **FOR THE COUNTY OF SAN DIEGO, CENTRAL DIVISION**  
10

11 Viejas Band of Kumeyaay Indians, a federally  
12 recognized Indian Tribe,

13 Petitioner and Plaintiff,

14 v.

15 PADRE DAM MUNICIPAL WATER  
16 DISTRICT, a public agency; and DOES 1  
17 through 10, inclusive,

18 Respondents and Defendants,  
19

Case No. 37-2010-00093203-CU-TT-CTL

**[PROPOSED] TEMPORARY  
RESTRAINING ORDER**

Complaint Filed: June 1, 2010

Date: June 7, 2010

Time: 8:45 a.m.

Dept: 68 – Honorable Judith Hayes

20 On June 7, 2010, Petitioner Viejas Band of Kumeyaay Indians' ("Viejas") Ex Parte  
21 Application for a Temporary Restraining Order came before Judge Judith Hayes in  
22 Department 68. Viejas appeared through its counsel Steven P. McDonald of The McDonald Law  
23 Firm, LC, Courtney Ann Coyle of the Law Office of Courtney Ann Coyle, and Kimberly Mettler  
24 of Viejas Office of Legal Affairs. Respondent Padre Dam Municipal Water District ("District")  
25 appeared through its counsel James Gilpin and Lindsay Puckett of Best Best & Krieger LLP.  
26 Deputy Attorney General Antonette Cordero also appeared on behalf of the Native American  
27 Heritage Commission (NAHC) in support of Petitioner's application. The NAHC is not a party to  
28 this action.

1 Based on the Verified Petition and Complaint on file herein, the Petitioner's and  
2 Respondent's Memoranda of Points and Authorities, the declarations filed therewith, and other  
3 pleadings and documents filed or lodged before the Court relating to Petitioner's Application for a  
4 Temporary Restraining Order,

5 THE COURT HEREBY ORDERS that a hearing on a Preliminary Injunction on this  
6 matter be set for June 25, 2010, at 1:30 p.m. in Department 68.

7 PENDING HEARING on the above Preliminary Injunction, the District, its agents,  
8 servants, assigns, contractors and subcontractors and all those acting in concert with it, ARE  
9 HEREBY RESTRAINED AND ENJOINED

- 10 1. From moving or otherwise disturbing any soils located within the portion of  
11 San Diego County Assessor's Parcel No. 398-140-16 (the "Site") cordoned off as of  
12 the date hereof by the parties, as generally depicted in Exhibit I hereto (the "Restricted  
13 Area"), except as otherwise provided in this Order and the interim protocol to be  
14 developed under paragraph 7 herein;
- 15 2. The District is not enjoined from construction, including the exporting and stockpiling  
16 of soils, on portions of the Site outside the Restricted Area, except as otherwise  
17 provided in this Order and the interim protocol to be developed under paragraph 7  
18 herein;
- 19 3. Soils that are excavated and removed from the Site as a result of construction allowed  
20 under this Order may be relocated to and stockpiled on an off-site area known as the  
21 Marshall Scotties Site ("Soils Storage Location"). Such area shall at all times be  
22 fenced and adequately secured;
- 23 4. The District shall not compact or build on the stockpiled soils at any location on the  
24 Site or the Soils Storage Location;
- 25 5. A representative of Viejas or observer(s) may access the Site, including the Restricted  
26 Area and the Soils Storage Location, provided, however, such representative or  
27 observer(s) shall provide District with 24 hours advance notice of their intent to access  
28

1 the Restricted Area. The District shall be permitted to have a representative  
2 accompany the representative of Viejas or observer(s);

3 6. A representative of Viejas or observer(s) who are at the Site, including the Restricted  
4 Area and the Soils Storage Location, shall not impede construction activities; and

5 7. The parties shall meet and confer promptly to develop an interim protocol for the  
6 observation, investigation and handling of soils excavated from areas not within the  
7 Restricted Area.

8 The above Temporary Restraining Order is effective immediately.

9 The Restraining Order granted herein shall expire upon the Court granting or denying a  
10 Preliminary Injunction on June 25, 2010.

11 IT IS SO ORDERED.

12  
13 Dated: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Judith Hayes  
Judge of the Superior Court



### PROOF OF SERVICE

Viejas Band of Kumeyaay Indians, v. Padre Dam Municipal Water District, et al.  
San Diego Superior Court Case No. 37-2010-00093203-CU-TT-CTL

I, Kelly McDonald, declare as follows:

I am employed with The McDonald Law Firm, LC, 7855 Fay Avenue, Suite 250, La Jolla, CA 92037. I am readily familiar with the business practices of this office for collection and processing of correspondence for mailing within the United States Postal Service. I am over the age of eighteen years, and am not a party to this action.

On June 11, 2010, I served the following:

[PROPOSED] TEMPORARY RESTRAINING ORDER

on the below parties in this action by placing a true copy (copies) thereof in a separate envelope(s), addressed as shown, for collection and mailing on the below indicated day pursuant to the ordinary business practice of this office which is that correspondence for mailing is collected and deposited with the United States Postal Service on the same day in the ordinary course of business.

James B. Gilpin, Esq.  
Best Best & Krieger LLP  
655 W. Broadway, 15<sup>th</sup> Floor  
San Diego, CA 92101  
Ph: 619.525.1300  
Fx: 619.233.6118  
Attorney for Respondent/Defendant Padre Dam Municipal Water District

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at La Jolla, California on June 11, 2010.

KELLY McDONALD





Secondary Connection Project  
Parcel Boundary

EDAM

**Padre Dam Secondary Connection - Reduced Impact Area**

0 20

EXHIBIT 1